MENTERI BAGI KEMENTERIAN DALAM NEGERI & ANOR v. JILL IRELAND LAWRENCE BILL & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
ABANG ISKANDAR JCA
[CIVIL APPEALS NO: W-01-298-08-2014 & W-01-332-08-2014]
23 JUNE 2015

ADMINISTRATIVE LAW: *Judicial review – Application to quash decision – Eight publications in form of Audio CD carrying word 'Allah' seized and confiscated – Whether power to withhold and confiscate publications exercised lawfully and legally – Whether there was clear demarcation between power given to Minister under s. 9 of Printing Presses and Publications Act 1984 (the Act) and power bestowed upon senior authorised officer under s. 9A of the Act – Letter purporting to confiscate publication signed by person other than Minister and not envisaged by Parliament as empowered to make order – Whether ultra vires s. 9 of the Act – Prayer sought to challenge prohibition of the use of the word 'Allah' – Whether could be done in collateral manner or to be challenged in isolation – Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*

CONSTITUTIONAL LAW: *Constitution – Infringement of – Eight publications in form of Audio CD carrying word of 'Allah' seized and confiscated – Whether there was deprivation of freedom of religion – Whether there was right to equality or freedom from discrimination – Whether case to be remitted back to High Court to ensure parties not deprived of constitutional right to appeal – Federal Constitution, arts. 8 & 11*

This was a judicial review application filed by the applicant seeking to challenge the purported decision of the Menteri Bagi Kementerian Dalam Negeri that had led to the withholding and ultimate confiscation of the eight publications in the form of audio compact discs ('the publications') belonging to the applicant pursuant to the alleged exercise of s. 9 of the Printing Presses and Publications Act 1984 ('the Act'). On 11 May 2008, the applicant landed at Sepang Low Cost Carrier Terminal ('LCCT') from Indonesia, bringing along with her eight Christian publications for her personal religious edification. A Customs Officer on duty detained the publications on account that they had carried the word 'Allah' in each of the eight titles. The applicant was served with a 'Notis Penahanan Barang-Barang' under s. 102 of the Customs Act 1967. Subsequently, the applicant received a letter dated 7 July 2008 signed by one Suzanah whose position had been described as 'Pegawai Kanan Berkuasa', stating that the publications were to be confiscated and seized. Dissatisfied with the said decision, the applicant filed an *ex parte* application for leave for judicial review ('JR') under O. 53 Rules of the High Court 1980 ('RHC') and s. 25 of the Courts of Judicature Act

1964 ('CJA') against the said decision. Leave was granted by the High Court for the court to hear the substantive application where the applicant sought the following reliefs, *inter alia* (i) an order for *certiorari* to quash the decision of the Ministry of Home Affairs; (ii) an order for *mandamus* directing the first respondent to return the publications to the applicant be issued, (iii) a declaration pursuant to art. 11 of the Federal Constitution that it was the constitutional rights of the applicant to import the publications in the exercise of her right to practice religion and right to education; and (iv) a declaration pursuant to art. 8 of the Federal Constitution that the applicant is guaranteed equality of all persons before the law and is protected from discrimination. Several other prayers were also sought for, which included an award of damages for unlawful and unconstitutional conduct of the respondents in regard to action taken on the publications. The High Court judge allowed only prayers (i) and (ii) of the reliefs. Both parties were aggrieved by the judge's decision. The respondents were dissatisfied with the granting of the orders of *certiorari* and of *mandamus* against the respondent and hence filed their appeals. The respondents' appeal was premised on the fact that, *inter alia*, the power to confiscate and seize had been exercised lawfully and legally under s. 9 and s. 9A of the Act. The applicant, who was aggrieved by the non-granting by the judge of the other prayers sought, had also filed her cross-appeal against the impugned parts of the same decision. The applicant submitted that Bahasa Malaysia was used by the applicant in the practice of her religion including services and prayers and that she had been using the term 'Allah' in all Christian reading as well as audio-visual materials.

Held (dismissing respondents' appeal; allowing applicant's cross-appeal in part)

Per Abang Iskandar JCA delivering the judgment of the court:

(1) There is clear demarcation between the power given to the Minister under s. 9 of the Act and the power bestowed upon the senior authorised officer under s. 9A of the Act. There is nothing stipulated in s. 9 of the Act indicating that the power of the Minister could be delegated to a subordinate authority. Neither was there any evidence led by the respondents to the effect that such delegation was indeed made. Thus, the letter dated 7 July 2008 that purported to confiscate the eight publications belonging to the applicant was one that was bad in law. It was done *ultra vires* s. 9 of the Act as it was made by a person, *to wit*, Suzanah, who was not the person envisaged by Parliament as the competent person who was empowered to make that order under s. 9 of the Act. The wordings in s. 9 of the Act are so clear that they do not allow any room for a suggestion to be made, let alone be heard, that any other person than the Minister can issue the permanent withholding order as envisaged thereunder. (paras 31 & 34)

(2) Any prayer that had sought to challenge the prohibition of the use of the word 'Allah' following the decision of the Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, must not be done in a collateral manner. The Enactment which had contained those prohibition on the use of the word 'Allah' had to be challenged specifically for want of jurisdiction. The impugned provisions in the Enactment could not be challenged in isolation, as was done in this case. To that extent, the court agreed with the judge's decision on the applicant's prayers that were not granted. (para 39)

(3) There were prayers that were predicated upon the deprivation of freedom of religion (art. 11) and the right to equality or freedom from discrimination (art. 8) which could and ought to have been dealt with by the judge, but were not. These issues involved scrutiny of the affidavit evidence before any finding could be made. It would be prudent if this case be remitted back to the High Court for those prayers to be considered in light of the affidavit evidence before another judge. This approach would ensure that parties were not deprived of their constitutional right of appeal on findings of fact as well as findings of law by the court of first instance, namely the High Court. (para 40)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan semakan kehakiman yang telah difailkan oleh pemohon yang menuntut untuk membantah keputusan Menteri Bagi Kementerian Dalam Negeri yang telah membawa kepada penahanan dan penyitaan lapan penerbitan dalam bentuk cakera padat audio ('penerbitan') yang dimiliki pemohon susulan pelaksanaan s. 9 Akta Mesin Cetak dan Penerbitan 1984 ('Akta'). Pada 11 Mei 2008, pemohon telah mendarat di Terminal Penerbangan Tambang Rendah ('LCCT') dari Indonesia, dan telah membawa bersama-sama dengannya lapan penerbitan berkenaan agama Kristian untuk kemajuan rohani agama peribadinya. Seorang Pegawai Kastam yang sedang bertugas telah menahan penerbitan itu atas alasan ia mempunyai perkataan 'Allah' dalam setiap satu daripada lapan tajuk penerbitan itu. Pemohon telah diserahkan dengan 'Notis Penahanan Barang-Barang' di bawah s. 102 Akta Kastam 1967. Seterusnya, pemohon menerima surat bertarikh 7 Julai 2008 yang telah ditandatangani oleh satu Suzanah yang kedudukannya digambarkan sebagai 'Pegawai Kanan Berkuasa', menyatakan bahawa penerbitan itu telah dirampas dan disita. Tidak berpuas hati dengan keputusan tersebut, pemohon telah memfailkan permohonan *ex parte* untuk kebenaran semakan kehakiman ('SH') di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi ('KMT') dan s. 25 Akta Mahkamah Kehakiman 1964 ('AMK') terhadap keputusan tersebut. Kebenaran telah diberikan oleh Mahkamah Tinggi untuk mahkamah mendengar permohonan substantif di mana pemohon memohon relif-relif berikut, antara lain (i) satu perintah

certiorari bagi membatalkan keputusan Menteri Bagi Kementerian Dalam Negeri; (ii) satu perintah *mandamus* mengarahkan responden pertama mengembalikan penerbitan kepada pemohon dikeluarkan; (iii) satu pengisytiharan menurut per. 11 Perlembagaan Persekutuan bahawa ia adalah hak-hak perlembagaan pemohon untuk mengimport penerbitan dalam menjalankan haknya untuk mengamalkan agamanya dan hak untuk memperolehi ilmu; (iv) satu pengisytiharan menurut per. 8 Perlembagaan Persekutuan bahawa pemohon dijamin kesaksamaan semua orang di bawah undang-undang dan dilindungi daripada diskriminasi. Beberapa tuntutan lain telah dituntut, termasuk award ganti rugi untuk kelakuan tidak sah dan tidak berperlembagaan oleh responden berhubungan tindakan yang diambil ke atas penerbitan. Hakim Mahkamah Tinggi hanya membenarkan tuntutan (i) dan (ii) daripada relif-relif yang dituntut. Kedua-dua pihak terkilan dengan keputusan hakim. Responden tidak berpuas hati dengan kebenaran perintah *certiorari* dan *mandamus* terhadap responden dan dengan itu memfailkan rayuan. Rayuan responden adalah berlandaskan fakta bahawa, antara lain, kuasa untuk merampas dan menyita telah dilaksanakan mengikut undang-undang di bawah s. 9 dan s. 9A Akta. Pemohon, terkilan dengan keputusan hakim yang tidak membenarkan tuntutan-tuntutan lain yang dituntut, telah juga memfailkan rayuan balas terhadap bahagian-bahagian yang dipersoalkan daripada keputusan yang sama. Pemohon menghujahkan bahawa Bahasa Malaysia digunakan olehnya dalam mengamalkan agamanya termasuk semasa khutbah dan doa dan dia telah menggunakan terma 'Allah' dalam segala pembacaan berkenaan agama Kristian serta bahan audio-visual.

Diputuskan (menolak rayuan responden-responden; membenarkan sebahagian rayuan balas pemohon)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Terdapat sempadan yang jelas antara kuasa yang diberikan kepada Menteri di bawah s. 9 Akta dan kuasa yang diberikan kepada pegawai kanan berkuasa di bawah s. 9A Akta. Tiada apa-apa yang dinyatakan dalam s. 9 Akta yang menunjukkan bahawa kuasa menteri boleh diwakilkan kepada kuasa bawahan. Tiada juga keterangan yang dikemukakan oleh responden-responden yang membawa kesan bahawa perwakilan itu sememangnya dibuat. Oleh itu, surat bertarikh 7 Julai 2008 yang dikatakan merampas lapan penerbitan milik pemohon adalah salah dari segi undang-undang. Ia dibuat *ultra vires* s. 9 Akta kerana ia dilaksanakan oleh seseorang, iaitu Suzanah, iaitu bukan orang yang dibayangkan oleh Parlimen sebagai orang yang berwibawa yang telah diberi kuasa untuk membuat perintah itu di bawah s. 9 Akta. Perkataan-perkataan dalam s. 9 Akta adalah sangat jelas bahawa ia tidak membenarkan ruang untuk cadangan dibuat, apatah lagi didengar, bahawa seseorang selain daripada Menteri boleh mengeluarkan perintah penahanan kekal seperti yang digambarkan.

(2) Apa-apa tuntutan yang dipohon untuk membantah larangan perkataan 'Allah' selepas keputusan Mahkamah Persekutan dalam *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, tidak boleh dilakukan dengan cara kolateral. Enakmen yang mengandungi larangan menggunakan perkataan 'Allah' harus dibantah secara spesifik dalam keadaan ketiadaan bidang kuasa. Peruntukan-peruntukan yang dipersoalkan dalam Enakmen tidak boleh dibantah secara berasingan, seperti yang dibuat dalam kes ini. Setakat ini, mahkamah bersetuju dengan keputusan hakim berkenaan tuntutan-tuntutan pemohon yang tidak benarkan.

(3) Terdapat tuntutan-tuntutan yang berlandaskan atas kehilangan hak kebebasan beragama (per. 11) dan hak untuk kesaksamaan atau kebebasan daripada diskriminasi (per. 8) yang harus dan sepatutnya telah diuruskan oleh hakim, tetapi gagal dibuat. Isu-isu ini melibatkan penelitian keterangan afidavit sebelum apa-apa dapatan boleh dibuat. Adalah lebih berhemat jika kes ini diremitkan kepada Mahkamah Tinggi untuk tuntutan-tuntutan itu dipertimbangkan berdasarkan keterangan afidavit di hapadan hakim yang lain. Pendekatan ini akan memastikan pihak-pihak yang terlibat tidak dinafikan hak perlembagaan mereka untuk merayu atas dapatan fakta serta dapatan undang-undang oleh mahkamah yang membicarakan, iaitu Mahkamah Tinggi.

Case(s) referred to:

Carltona Ltd v. Commissioners of Works & Ors [1943] 2 All ER 560 ***(refd)***
Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***
Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***
Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 6 CLJ 541 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25
Federal Constitution, arts. 8, 11
Printing Presses and Publications Act 1984, ss. 2, 9(1), 9A
Rules of Court 2012, O. 15 r. 6, O. 53 r. 8
Rules of the High Court 1980, O. 53

(Civil Appeal No: W-01-298-08-2014)
For the appellant - Shamsul Bolhassan, (Norinna Bahadun & Andi Razalijaya A Dadi with him); SFCs
For the respondent - Lim Heng Seng (Annou Xavier, Tan Hooi Ping with him); M/s Azri, Lee Swee Seng & Co

(Civil Appeal No: W-01-332-08-2014)
For that appellant - Lim Heng Seng (Annou Xavier & Tan Hooi Ping with him); M/s Azri, Lee Swee Seng & Co
For the respondent - Shamsul Bolhassan (Norinna Bahadun & Andi Razalijaya A Dadi with him); SFCs

Watching brief - Rodney Koh Ngiap Teik; Sidang Injil Borneo (SIB) Semenanjung
Irwin Lo Chi Vui; Sabah Council of Churches
Lim Fang Say; Jaringan Orang Asal Se Malaysia
Suaran Singh Sidhu; National Evangelical Christian Fellowship Malaysia
Bobby Chew Chin Guan; Sidang Injil Borneo (Sabah)
Leonard David Shim; Assoc of Churches in Sarawak & Advocates Assoc of Sarawak
Kenny Ng Bee Ken; Borneo Evangelical Mission
Joseph Lourdesamy; Titular Roman Catholic Archbishop
Gan Ping Shou; Malaysia Chinese Assoc
Andrew Khoo; Bible Society Malaysia, Diocese of West Malaysia, Christian Federation of Malaysia, MOB of Bar Council Malaysia

[Editor's note: For the High Court judgment, please see Jill Ireland Lawrence Bill v. Menteri Bagi Kementerian Dalam Negeri Malaysia & Anor [2014] 1 LNS 1279 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar JCA:

Introduction

[1] We had heard both parties on 23 April 2015. At the end of the hearing, we had indicated to parties that we needed time to deliberate before coming to a decision. This is now our decision.

[2] This matter had emanated from the decision of the High Court sitting at Kuala Lumpur. It concerns a judicial review application filed by one Jill Ireland binti Lawrence Bill ('the applicant') that had sought to challenge the purported decision of the Menteri Bagi Kementerian Dalam Negeri that had led to the withholding and ultimate confiscation of the eight publications in the form of CD ("the publications") belonging to the applicant pursuant to the alleged exercise of s. 9 of the Printing Presses and Publications Act 1984 ("the Act"). Both the Menteri Bagi Kementerian Dalam Negeri and by extension, the Government of Malaysia had been cited as respondent 1 and respondent 2 by the applicant in her application respectively.

Factual Background

[3] The applicant is a Malaysian citizen. She is a Melanau from Sarawak and she professes the Christian faith. The cause papers show that the applicant uses Bahasa Malaysia in all aspects of her profession and practice of Christianity.

[4] On 11 May 2008, the applicant landed at Sepang Low Cost Carrier Terminal ("LCCT") from Jakarta, Indonesia, bringing along with her eight Christian educational audio compact discs ("the publications"), for her personal religious edification.

[5] A customs officer then on duty, had detained the publications on account that they had carried the word "Allah" in each of the eight titles. The applicant was served with a "Notis Penahanan Barang-Barang Di Bawah Seksyen 102 Akta Kastam 1967" on the same date. The notice sets out the address of the agency for reference ie, Kementerian Keselamatan Dalam Negeri, Bahagian Kawalan Penerbitan dan Teks Al Qur'an, Cawangan KLIA, Selangor.

[6] Subsequently, the applicant had received a letter dated 7 July 2008 (as at p. 160 of the core bundle) which contained *inter alia*:

> 2. Pada menjalankan kuasa-kuasa di bawah Seksyen 9(1) Akta Mesin Cetak dan Penerbitan 1984, Kementerian ini telah membuat keputusan terhadap penerbitan yang ditahan berkenaan adalah seperti di Lampiran 'K'.
>
> 3. Tuan diminta berhubung dengan pejabat ini dalam tempoh 30 hari dari tarikh surat ini dikeluarkan bagi melaksanakan apa-apa keputusan yang berkaitan atau mengemukakan rayuan secara bertulis mengenainya. Semua penerbitan yang disita dan ditahan di bawah Seksyen 9A, 17 dan 18 ini akan terlucut hak menurut Seksyen 19(2) AMCP 1984 selepas tempoh 30 hari. Sekiranya tuan gagal berbuat demikian, penerbitan tuan akan dilupuskan mengikut apa-apa cara yang diputuskan oleh Kementerian menurut Akta yang sama.

(AMCP 1984 referred to Akta Mesin Cetak dan Penerbitan 1984 and is the Act in English).

[7] Lampiran K referred to in para. 2 in the letter dated 7 July 2008 is the list of the eight publications that had contained the word "Allah" in each of them and it also contained the reasons assigned for the confiscation of the various titles.

[8] The letter dated the 7 July 2008 was signed by one Suzanah bte Hj Muin whose position has been described as 'Pegawai Kanan Berkuasa' in the said letter.

The Applicant's Legal Challenge

[9] Dissatisfied with the decision, the applicant had on 20 August 2008 filed an *ex-parte* application for leave for judicial review ("JR") under O. 53 of Rules of the High Court 1980 ("RHC") and s. 25 of the Courts of Judicature Act 1964 ("CJA") against the 7 July 2008 decision at the High Court at Kuala Lumpur.

[10] On 4 May 2009, leave was granted by the learned High Court Judge for the court to hear the substantive application where the applicant had sought the following reliefs:

(a) An order for *certiorari* to quash the decision of the Ministry of Home Affairs to confiscate and seize the publications as follow:

(i) Cara Menggunakan Kunci Kerajaan Allah;

(ii) Cara Hidup Dalam Kerajaan Allah;

(iii) Ibadah Yang Benar Dalam Kerajaan Allah;

(iv) Metode Pemuridan Kerajaan Allah;

(v) Pribadi Yang Bertumbuh Dalam Kerajaan Allah;

(vi) Hidup Benar Dalam Kerajaan Allah;

(vii) Pemerintahan Kerajaan Allah Dalam Hidup Kita; and

(viii) Rahasia Kerajaan Allah.

(b) An order for *mandamus*, directing the first respondent to return the publications to the applicant, be issued;

(c) A declaration pursuant to art. 11 of the Federal Constitution that it is the constitutional rights of the applicant to import the publications in the exercise of her right to practise religion and right to education;

(d) A declaration pursuant to art. 8 that the applicant is guaranteed equality of all persons before the law and is protected from discrimination against citizen, on the grounds of religion in the administration of the law ie, the Printing Presses And Publications Act 1984 (Act 301) and Customs Act 1967;

(e) A declaration pursuant to art. 8 and art. 11 that the applicant is entitled to use the word 'Allah' and to have the right to own, to possess, to use and to import publications which contain the word 'Allah' in the exercise of her freedom to practice religion;

(f) A declaration that it is the legitimate expectation of the applicant to exercise her right to use and/or to continue to use the word of 'Allah' and to have and continue to have the right to own, to possess, to use and to import published materials notwithstanding the use of word 'Allah' in the said publications including the said publications in the exercise of her freedom to practice religion;

(g) An order that all further proceedings in respect of the decision of Ministry of Home Affairs be stayed until determination and disposal of the application;

(h) An award of damages including exemplary damages for unlawful and unconstitutional conduct of the respondents in regard to action taken on the publications;

(i) All necessary and consequential directions and orders which the court deems fit and proper to be given; and

A (j) All other and further reliefs which the court deems fit and proper;

(k) Costs to be in the cause.

[11] On 21 July 2014, the High Court Judge allowed only prayers (a) and (b) of the reliefs that were sought by the applicant.

B **[12]** Both parties were apparently aggrieved by the judge's decision in their own way, as reflected in their cause papers filed before us. The respondents were dissatisfied with the granting of the orders of *certiorari* and of *mandamus* against the respondent 1. As for the applicant, she was aggrieved by the non-granting by the judge of prayers (c), (d), (e), (f), (h), (i) and (j) in the C application. The respondents had since filed in their appeal against the judge's decision and the applicant had also filed her cross-appeal against the impugned parts of the same decision.

[13] Before we had proceeded to hear the matters in the appeals, there was a motion that was filed by Majlis Agama Islam Wilayah Persekutuan D ("MAIWP") to be made as interveners in this appeal. While the respondents did not make any particularly strong stand on the matter, for or against, the applicant had objected to this motion in encl. 6a. Having heard submissions by parties, we had unanimously dismissed encl. 6a as it was not brought under the proper provisions in the Rules of Courts 2012 pertaining to the E application to be made as interveners in a judicial review matter.

[14] This encl. 6a was filed under O.15 r. 6 of the ROC 2012. We had agreed with learned counsel for the applicant that the mode of filing encl. 6a was fatally flawed. It should have been done by invoking O. 53 r. 8 of the ROC 2012 which reads as follows:

F

> Other person who may be heard (O. 53, r. 8)
>
> (1) Upon the hearing of an application for judicial review, any person who desires to be heard in opposition to the application and appears to the judge to be a proper person to be heard may be heard notwithstanding that he has not been served with the cause papers G in the matter.

[15] High judicial authority can be found in support of that proposition in the case of *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405 ("the *MAIS* case"). In light of those specific provisions contained in r. 8 therein, the provisions contained in O. 15 r. 6 of the ROC 2012, which H are of general application, are thereby superseded. The legal maxim *generalia specialibus non derogant* would apply in full force, whereby the maxim seems to suggest that the court would prefer specific provisions over general ones where the provisions conflict.

I **[16]** We wish to reproduce what learned Justice Zukefli Ahmad Makinudin FCJ (as he then was) has said in the *MAIS* case (*supra*):

> [16] Based on the above well laid-out provision in the RHC it is evident that the Rules Committee had intended to establish a specific framework for the determination of application for judicial review. In my view O. 53

of the RHC was specifically drafted for that purpose. It has been revised over time, the last amendment to O. 53 of the RHC having taken place in the year 2000 by which it was substantially revised and amended *vide* PU(A) 342/2000. It is my judgment that O. 53 r. 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition. This is discernible from the language of the rule in particular the phrase "… appears to the judge to be a proper person …" As a specific rule was put in place for judicial review proceedings, the more general basis for intervention under O. 15 r. 6(2)(b) of the RHC cannot be invoked. The maxim "*generalia specilibus non derogant*" would apply. The decision of the majority of the Court of Appeal in the present case that the appellant's application must be brought under O. 53 r. 8(1) of the RHC in my view was therefore correct. Question 1 is therefore answered in the negative.

[17] However, we had allowed MAIWP to attend this court proceeding as 'watching brief' and that it could be heard by the court on invitation as *amicus curiae* by the court in exercise of its discretion, during the hearing of the main appeal. We therefore had dismissed encl. 6a with no order as to costs.

The Appeal And Cross-Appeal

[18] For the purpose of the appeal and cross-appeal, the parties will be referred to as they had appeared in the High Court. We had proceeded to hear submissions by the respondents first. The respondents' appeal was against the granting of prayers (a) and (b) including costs of RM5,000, followed by the applicant's cross-appeal against the dismissal by the learned judge of prayers (c), (d), (e), (f), (h), (i) and (j) of the reliefs sought.

[19] The respondents' appeal was premised on the following considerations:

(1) It was within the discretionary power of the Minister to refuse importation or to withhold delivery if he was satisfied that the publications were within the ambit within which s. 9 of the Act, sought to authorise him to so act.

(2) The decision was made pursuant to Arahan Kerajaan dated 19 May 1986, special directive dated 5 December 1986 and also on the premise of public safety and public order.

(3) Since the word 'Allah' was contained in the publications, the first respondent had the power to withhold them. The power had been exercised lawfully and legally under s. 9, s. 9A and the definition section of s. 2 of the Act.

(4) The court must be very cautious in reviewing the decision so as not 'to step into the shoes of decision maker'. This would be contrary to the well-established principles of judicial review.

(5) The usage of the word 'Allah' in the publications may cause harm to public security and public order as well as causing religious tensions among the Christians and Muslims in Malaysia.

(6) The decision did not infringe any of the fundamental rights guaranteed under arts. 8 and 11 of the Federal Constitution.

(7) The right to freedom of religion is not absolute and subject to public order, public health and morality.

[20] Nevertheless before us, the learned Senior Federal Counsel ("SFC") had indicated to us that he would be focussing on the issue that the impugned order to confiscate the eight publications belonging to the applicant was in fact properly made by the Minister himself. Meaning that the order as embodied in the letter to the applicant dated 7 July 2008 was valid and that as such, the learned High Court Judge was wrong in deciding otherwise.

[21] In order to appreciate the granting of prayers (a) and (b) of the application by the learned judge, one has to go back to look at the order by the learned judge as to why the *certiorari* was granted to quash the purported decision of the Minister that was said to be done in exercise of s. 9 of the Act and the order of *mandamus* to compel the Minister to return the publications to the applicant.

[22] After establishing that s. 9 of the Act confers power only to the Minister to issue the necessary order on permanent confiscation of the publications and that such power could not in law be exercised by any other persons, the learned judge had said at p. 8 of her judgment as follows:

> [12] In other words, a statutory and discretionary power must be exercised by the person to whom the Parliament had vested the power onto and cannot be sub-delegated to any other authority or official.

[23] In the course of coming to that conclusion, she had dissected s. 9 and s. 9A of the Act and had concluded that while s. 9A authorises any senior authorised officer to make an interim order to withhold suspected published materials from being imported into Malaysia, s. 9 specifically empowers the Minister to issue a final order regarding the same. The learned judge had rightly noticed the distinction intended and we are of the view that she was right in that regard. In fact, such intention is clearly seen as expressed under s. 9A itself where it states, "he may withhold delivery of such publication pending the decision of the Minister to deal with it as provided for under section 9". The inter-play between s. 9A and s. 9 and as to who their main protagonists are, cannot be clearer than that. They involve a two-tier exercise, first s. 9A by the senior authorised officer, to be followed by an order of the Minister, if the situation so warrants, pursuant to s. 9 of the Act.

[24] It was also argued before us by learned SFC that the evidence as per the relevant affidavits had shown that the letter dated 7 July 2008, although signed by Suzanah bte Hj Muin, a Senior Authorised Officer, ("Suzanah"),

she had so signed as she was just communicating the decision of the Minister to the applicant. In other words, Suzanah did not decide under s. 9 but that she was only informing or conveying to the applicant what had been decided by the Minister. It was also submitted before us by learned SFC that the principle in the case of *Carltona Ltd v. Commissioners of Works & Ors* [1943] 2 All ER 560 ought to apply in the circumstances of this case. His submissions on this point were articulated as follows, as can be seen in his written submissions at pp. 51-52:

> We conclude that the Minister as the head of the Ministry of Home Affairs is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. In the administration of government in this country, the functions which were constitutionally given to the minister are so multifarious that no minister could ever personally attend to them. The duties imposed upon the ministries and the powers given to the ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Thus, in this present case, though the letter dated 7.7.2008 was signed by one Suzanah Haji Muin, the decision to withhold the 8 CDs under subsection 9(1) of the Printing, Presses and Publication Act 1984 was the decision of the Minister of the Ministry of Home Affairs.

[25] As such, it was urged before us by learned SFC that the learned judge had erred when she found as a fact that the decision under s. 9 had been made by Suzanah instead of it having been made by the Minister.

[26] In this regard, we had to look at the letter dated 7 July 2008 itself to see whether such submission by learned SFC could be sustained. That letter appears at p. 160 of the respondent's core bundle. It was clearly signed by Suzanah bte Hj Muin, a Senior Authorised Officer, from the Home Affairs Ministry. Paragraph 2 of the letter said that in exercise of the powers under s. 9(1) of the Act, the Ministry ("Kementerian") had decided to withhold the publications as appeared in the annexure marked 'K' for reasons as stated therein. It was signed off by Suzanah.

[27] Learned SFC had tried to impress upon us that this decision was made by the Minister himself and that Suzanah was only instructed to convey that decision made by the Minister. We were, as was the learned judge, referred to the affidavit of the then Minister which according to the learned SFC would dispel all doubts surrounding the decision maker in this case. First, we only need to say that there was nothing stated in the letter dated 7 July 2008 that would convey the meaning that Suzanah was directed by the Minister to convey the Minister's decision on the fate of the publications. Secondly, para. 2 spoke of the decision of the 'Kementerian' as opposed to decision of the 'Minister' as envisage by s. 9 of the Act. As regards the

affidavit, the relevant averment as contained in para. 10 of afidavit jawapan responden affirmed by Syed Hamid b. S Jaafar Albar (as at p. 133 of respondent's core bundle), reads as follows:

> Saya merujuk kepada Afidavit Jawapan Responden Suzanah binti Haji Muin… dan bersetuju serta mengesahkan bahawa tindakan beliau adalah selaras dengan tindakan melaksanakan dan menguatkuasakan undang-undang dan polisi kerajaan sejak tahun 1986 tersebut melalui peruntukan di bawah Akta 301.

[28] It is clear that the said affidavit by Syed Hamid, who was the former Minister responsible for Home Affairs only went so far as confirming that Suzanah had acted in a manner that was consonant with the law and with the applicable government policy in place since 1986. We noted that there was nothing in the said former Minister's affidavit that had stated that he was the person, as the then Minister, who had made the required decision under s. 9 of the Act. Neither had he averred that Suzanah was merely communicating his decision made under that s. 9.

[29] How did the learned judge deal with this aspect of the SFC's contention? For that, we would advert to her judgment at p. 718 of the appeal records, where she had said as follows:

> In other words, the Minister has himself admitted that it was the decision of Suzanah. It was Suzanah who made the permanent withholding order and not the Minister. And she did it in her own capacity on the strength of an 'Arahan Kerajaan' issued on 5.12.1986.

[30] Reverting to the submissions by learned SFC on the case of *Carltona Ltd* (*supra*), it was apparent to us that his written submissions were developed from what was said by Lord Greene MR in that *Carltona Ltd* case (*supra*). This was what the learned Master of the Rolls had said:

> In the administration of government in this country the functions which were given to the ministers (and constitutionally properly given to the ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The

> whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.

[31] With respect, the factual matrix obtaining in this instant appeal presents an entirely different scenario in that the legislative framework that has been set up in the Act is entirely clear. There is clear demarcation between the power given to the Minister under s. 9 and the power bestowed upon the senior authorised officer under s. 9A of the Act. We noted that there was nothing stipulated in s. 9 of the Act indicating that the power of the Minister could be delegated to a subordinate authority. Neither was there any evidence led by the respondents to the effect that such delegation was indeed made. The fact of the matter is that there is no getting away from the cardinal principle so entrenched in public law domain that the exercise of a statutory power may only be exercised in the manner as intended by the legislature as expressed in the statutory provisions. We would, with respect, agree with the learned counsel for the applicant in his submissions before us when he said:

> In this dual powers and authorities statutory assignment of powers, an official only empowered to make a temporary withholding order cannot step into the shoes of the Minister to make a permanent withholding order.

[32] In the absence of any other positive averment to the effect that Suzanah was acting on clear instruction by the former Minister that she was only communicating his decision under s. 9 of the Act, we are with respect, constrained to agree with the finding of the learned judge as quoted above that had appeared in para. 13 in her judgment. Having so found, the submission put forth by learned SFC before us could not therefore be sustained.

[33] The nett result of this conclusion by us, would mean that the letter dated 7 July 2008 that purported to confiscate the eight publications belonging to the applicant is one that was bad in law. It was done *ultra vires* s. 9 the Act as it was made by a person, to wit Suzanah bte Hj Muin, who was not the person who was envisaged by Parliament as the competent person who was empowered to make that order under s. 9 of the Act. One of the grounds identified by Lord Diplock in the *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374 ("*CCSU*'s case") upon which a decision of a public official, of which a Minister is one such official, may be quashed by the court in a judicial review proceeding is that the impugned decision is devoid of legal basis. In other words, it is *ultra vires* and is therefore illegal. In the instant appeal, the learned judge had concluded as follows:

A [15] Accordingly, I agree with the learned counsel for the applicant that the order as contained in the said letter dated 7.7.2008 is *ultra vires* the Act 301. The Respondent is guilty of an error of law in its action as the officer has exercised a power which she does not have. This, in my view is obviously illegal.

B **[34]** With respect, we agree with the learned judge on that score. Suzanah was the perfectly clothed officer in the context of s. 9A of the Act where she was fully competent to issue an interim order to withhold suspected printed materials which fell within the contemplation of that section. But, to put it mildly, she was ill-equipped to issue an order that was envisaged to be issued by a Minister under s. 9 of the Act. The evidence in this case supported the finding of the learned judge that this has been a classic case of *ultra vires*, where a public official, as in our instant case had acted in excess of what the law had authorised her to act. The wordings in s. 9 of the Act are so clear that they do not allow any room for a suggestion to be made, let alone be heard, that any other person than the Minister can issue the permanent withholding order as envisaged thereunder.

[35] The learned counsel for the applicant had in his submissions forwarded alternative grounds for saying that the order made purportedly in the letter dated 7 July 2008 must be bad in law. Indeed, we had occasion to consider them. But suffice in our view to say, that on the ground of clear *ultra vires* having been established alone, the order contained in the said letter, would be enough to provide this court with the necessary justification to dismiss the appeal by the respondents, as one that is without any merit. As such, the appeal by the respondents is hereby dismissed. The learned judge's orders in respect of prayers (a) and (b) are hereby affirmed.

F **The Cross-Appeal By The Applicant**

[36] The applicant's case is premised on the following points:

(a) Freedom to profess and practice one's religion including the rights to possess religious materials ie, the publications;

G

(b) Bahasa Malaysia is used by the applicant in the practice of her religion including services, prayers, worship, praises etc;

(c) The applicant has always been using the term 'Allah' in all Christian reading as well as audio visual materials.

H

(d) The publications are intended to be used for her own religious edification and will not be made available to the public or the Muslims;

(e) P.U.(A) 134/82 permits ALKITAB to be used by the Christians in churches, *ipso facto*, permits any other Christian publication with the word 'Allah'.

I

(f) Access and use of the publications are pursuant to her constitutional rights;

(g) The action of the respondents is irrational, perverse and unreasonable. A

[37] We must revert to the judgment of the learned judge to see how she had dealt with the applicant's prayers which she had subsequently declined to grant. That must necessarily lead us to p. 719 of the appeal records. It was contained in para. [16] of her judgment as follows: B

> The applicant in this application also seeks for certain declarations concerning her rights as guaranteed by Articles 8 and 11 of the Federal Constitution. In the respondent's affidavit in Enclosure 6, the respondent states that the applicant's action in bringing the 8 CDs will lead to violation of provision of state enactments on control and restriction of propagation of non-Islamic religion among Muslim pertaining to the prohibition of certain words or C phrases by non-Islamic religions. Although the applicant is not challenging those Enactments, but it is my view, the issue here cannot be considered without taking into consideration the provision of those enactments; its validity and constitutionality.

[38] In para. [17] of her judgment, the learned judge had gone on to say as D follows:

> The question on the usage of the word "Allah" which the applicant argues to be her right guaranteed by Articles 8 and 11 of the Federal Constitution, cannot in my view be considered in isolation without taking into consideration the validity and constitutionality of those laws as well. E In *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541, the Federal Court in its majority decision had *inter alia* held as follows:
>
> > [5] Clause 3 of art. 4 of the Constitution provides that the validity of any law made by Parliament or a State Legislature may not be questioned on the ground that it makes provision with respect to F any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings, one of which is "in proceedings for a declaration that the law is invalid on that ground", in which case the Federation or the State is entitled to be a party to such proceedings. Clause (4) of art. 4 on G the other hand provides that such proceedings may not be commenced by an individual without leave of a judge of the Federal Court. Consequently, the party seeking to challenge the validity or the constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the H Federal Court. Further, the respective State must be made party so as to give the State an opportunity to defend the validity or constitutionality of the impugned provision. (para 40)
> >
> > [7] The constitutional questions posed in Part B of this application, which relate to the usage of the word "Allah" in the Herald, concern the rights as guaranteed by arts. 3, 8, 10, 11, and 12 of the I

> Constitution. These questions could not be considered is isolation without taking into consideration the impugned provision. However, as it is this court's finding that a challenge on the validity and unconstitutionality of the impugned provision could not made for the reasons stated, it is therefore not open for this court to consider the questions posed in Part B. (para 44]

[39] With respect, we agree with her, partially. We agree with her that any prayer that had sought to challenge the prohibition of the use of the word 'Allah', following the decision of the majority in the Federal Court in the *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541, must not be done in a collateral manner. The Enactment which had contained those prohibitions on the use of the word 'Allah' has to be challenged specifically for want of jurisdiction. The impugned provisions in the Enactment cannot be challenged in isolation, as was done in this case. To that extent we would agree with the learned judge's decision on the applicant's prayers that were not granted.

[40] However, we noted that there were prayers that were not inextricably tied down specifically with the use of the word 'Allah', especially those which were predicated upon the deprivation of freedom of religion (art. 11) and the right to equality or freedom from discrimination (art. 8) which we believe, could and ought to have been dealt with by the learned judge, but were not. That would relate to the declarations that were sought for as contained in prayers (c) and (d) of the application. The learned counsel for the applicant had invited us to make a decision on those issues. Nevertheless, we would with respect agree with learned counsel for MAIWP (watching brief) that as these issues involved scrutiny of the affidavit evidence before any finding could be made, it would be prudent if this case be remitted back to the High Court for those prayers to be considered in light of the affidavit evidence before another judge. This approach, will also ensure that parties are not deprived of their constitutional right of appeal on findings of fact as well as findings of law by the court of first instance, namely the High Court.

[41] Premised on the above, we hereby allow the cross-appeal by the applicant in part, by us making the following varying order that this case be remitted back to the High Court to hear and consider the applicant's:

(i) prayer (c) namely;

> (c) a declaration pursuant to art. 11 of the Federal Constitution that it is the constitutional rights of the applicant to import the publications in the exercise of her rights to practise religion and right to education; and

(ii) prayer (d) namely;

(d) a declaration pursuant to art. 8 that the applicant is guaranteed equality of all persons before the law and is protected from discrimination against citizen, on the grounds of religion in the administration of the law ie, the Printing Presses And Publications Act 1984 (Act 301) and Customs Act 1967.

[42] As to costs, having heard parties, we make no order as to costs.

[43] Order accordingly.